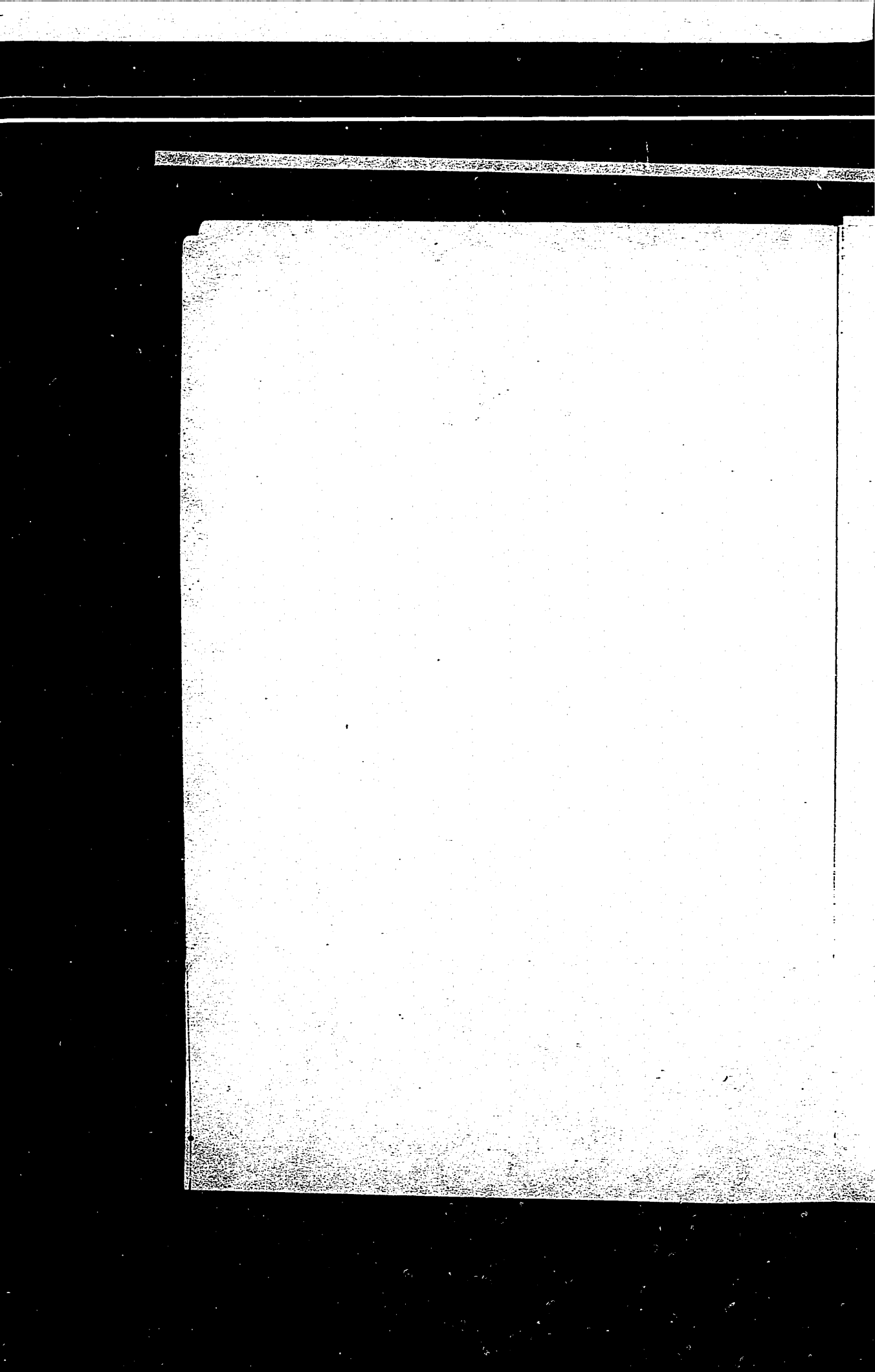


Organ to be recommendatory would be to relieve other American states of any obligation to participate in the surveillance overflights.

(2) *The United Nations Charter*

(a) *Threat or use of force*—The United Nations Charter provides that the obligations under it shall prevail over any conflicting international obligations. Similarly by its own terms, the Rio Treaty subordinates its provisions to those of the Charter. Analysis of the validity of surveillance overflights must, therefore, take into account the provisions of the Charter, in particular, Article 2(4) in which the Member States undertake to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations."

In my view, surveillance overflight, as such, does not involve the threat or use of force within the meaning of this Article. Neither the purpose nor the effect of such activity would be to bring hostile force to bear against the country under surveillance. Nor would it constitute a threat that force would be used unless that country bent to the will of the overflying powers. It would be a measure necessary for the common defense under Article 6 of the Rio Treaty. The sole purpose would be to gain information, information that would itself be used only for defensive military preparations. This position would gain in strength if the surveillance were accomplished by high-flying unarmed planes like the U-2, known to be without offensive capability.

There is a certain difficulty in maintaining that overflight activity is the use of armed force for the purposes of Article 8 of the Rio Treaty, but is not the threat or use of force within the meaning of Article 2(4) of the UN Charter. But this apparent inconsistency can be resolved in terms of the differing purposes of the two provisions.

(b) *Potential Cuban countermeasures*—We may anticipate that any intrustion into Cuban airspace will provoke countermeasures from the Cuban Government and her allies. If, as has been argued above, overflights carried out pursuant to an action of the Organ of Consultation under Article 6 of the Rio Treaty are lawful, it would appear that Cuba would not be justified in taking action to interfere with the flight. This conclusion, too, would be strongest in the case of a U-2 type overflight where the reconnaissance plane was obviously no offensive threat. In such a case, Cuba could not plausibly claim that an attempt to shoot down or divert the plane was action taken in defense against armed attack.

On the other hand, surveillance overflight might be carried out by less innocuous looking aircraft. RB-47's or other combat type aircraft flying at lower altitudes might reasonably seem, to Cuban military forces, to

be engaged in an attack mission. If so, Cuba would have a strong case for regarding the overflight as a threat of force and for taking self-defensive action against it. The case would not be altered even if the OAS pilots in fact had no intention to attack and even if the fact that the mission was limited to reconnaissance had been announced in advance. In circumstances of such apparent danger, no nation could reasonably be required to rely on the good faith of others.

If the overflight itself was not wrongful, in logic it would seem that armed action to protect the planes against Cuban countermeasures would also be permissible. In fact, however, when these consequences—amounting in effect to full scale air war—are predictable, it becomes very difficult to defend the decision to launch the overflight in the first place as consistent with the Charter obligation to refrain from the use or threat of force.

Once countermeasures had been taken against an overflight, whether ground-to-air or air-to-air, nice analysis of the legality of counter-countermeasures would become increasingly academic. Neither side could be said to have surrendered its right to self-defense. The situation would lend itself to rapid escalation. The onus would inevitably be upon the party setting in motion a chain of events having these foreseeable consequences.

(c) *Security Council Jurisdiction*—Article 53 of the UN Charter provides:

> "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . ."

If surveillance overflights were to be considered "enforcement action", Security Council approval, obviously not obtainable, would be required.

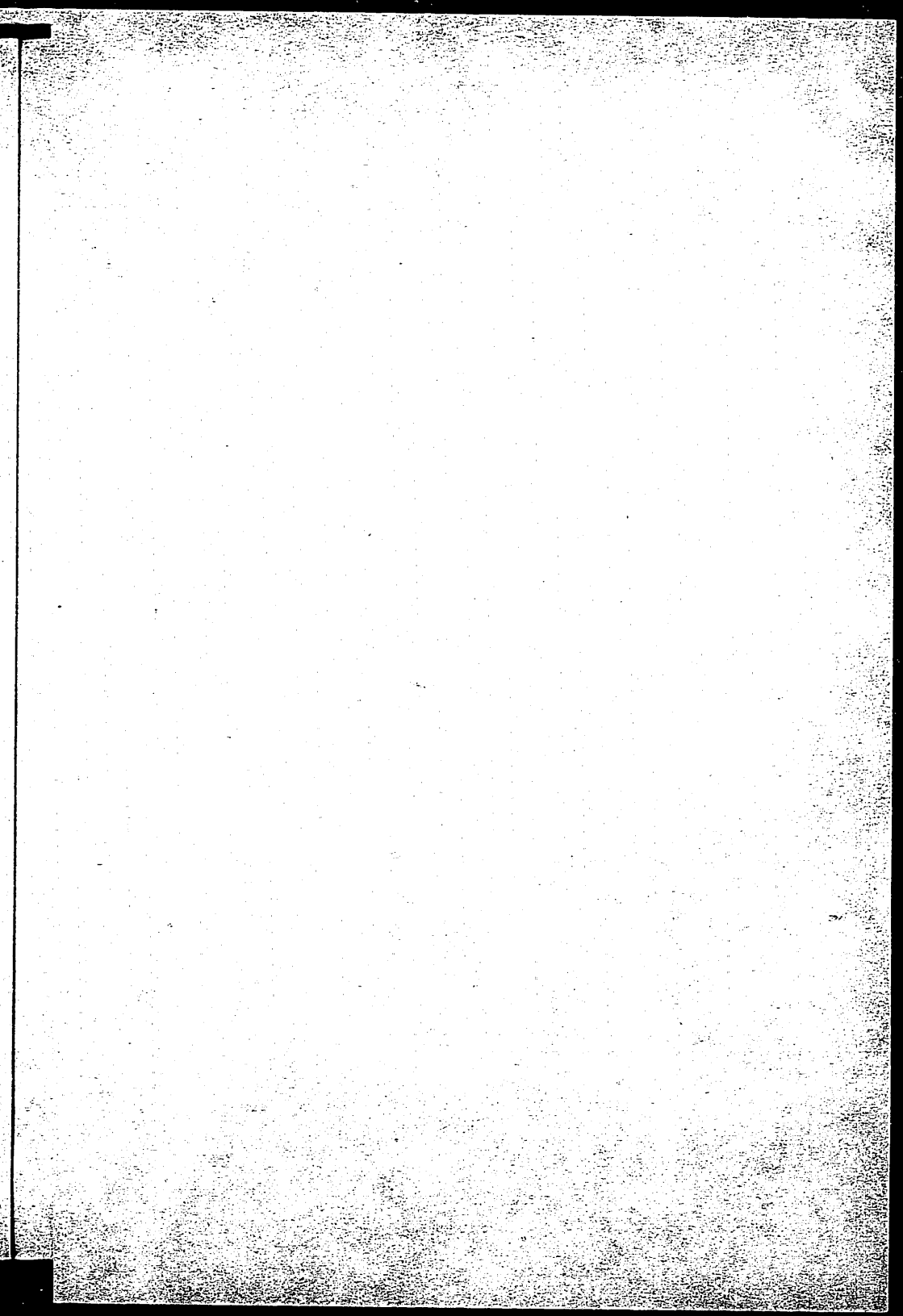
There has never been any authoritative definition of "enforcement action" and the few precedents bearing on the question are unclear. In the two cases which have come before the Council—one involving sanctions against the Dominican Republic and the other the suspension of Cuba from OAS participation—the United States took the position that no enforcement action was involved. Although in neither case did the Security Council formally adopt this view of the matter, it acted in accordance with the United States position and declined to review the OAS action. Surveillance overflight is distinguishable in many ways from the sanctions heretofore considered by the Security Council. The surveillance flights are not designed to compel the government against which they are directed to take or desist from taking some action so as to comply with international obligations or with the authoritative order of an international body.

In reporting the Organ of Consultation action to the Security Council,

in accordance with the terms of Article 5 of the Rio Treaty, the OAS would make clear that this action was not intended as enforcement action. Any proposal that the Security Council should, nevertheless, consider the matter as once coming under Article 53, would be subject to veto.

(3) *The United States Base at Guantanamo*

A subsidiary question arises as to the relation of surveillance overflights to the U.S. base rights at Guantanamo. In my view, if overflights were to be authorized by the Organ of Consultation, we should not employ Guantanamo as a base either for the planes engaged in surveillance themselves or for protection or support of those planes. It would be very difficult to maintain that under the Guantanamo Treaty the Cuban government granted the right to use the base against itself. Such use of the base would seriously weaken our legal position in defense of our base rights.



[redacted]

b. JCS HAS ADVISED CINCPAC OF THE STATE DEPARTMENT'S CONCERN OVER SPECULATION WHICH MAY ARISE FROM EXERCISE KOREA FY 63-1 SINCE ROK TRAINING FOR COVERT TYPE OPERATIONS IS IN VIOLATION OF THE ARMISTICE AGREEMENT.

JCS REQUESTED THAT PUBLIC RELATIONS AGENCIES CONCERNED ANTICIPATE INQUIRIES AND PREPARE IN ADVANCE A REPLY TO THE EFFECT THAT THE TRAINING IS ROUTINE AND PROMOTES CLOSER ROK-US COORDINATION AND SKILLS IN NEW TACTICS.

JCS 282146Z (S)

c. THE 81ST AND 33RD ARMY TRANSPORTATION COMPANIES (EQUIPPED WITH H-21 HELICOPTERS) ARRIVED AT SAIGON ON 17 SEP, AND HAVE BEEN DEPLOYED TO PLEIKU AND BIEN HOA RESPECTIVELY. BOTH COMPANIES ARE EXPECTED TO BE FULLY OPERATIONAL BY 6 OCT. THIS DEPLOYMENT RAISES THE NUMBER OF ARMY HELO COMPANIES IN SVN FROM THREE TO FIVE.

JWR (C)

d. OUSARMA NEPAL HAS REPORTED TO DA THAT THERE ARE STRONG INDICATIONS THAT THE KING OF NEPAL DESIRES TO SIGN A MILITARY PACT AND IS ALSO INTERESTED IN AN AFFILIATION WITH SEATO.

OUSARMA NEPAL 281105Z (S)

3. MARINE CORPS

a. CG FMFPAC HAS ADVISED CMC THAT THE ISSUE OF M-14 RIFLES TO 3D MAW AND OTHER WEST COAST AVIATION UNITS HAS BEEN

[redacted]

[redacted]

HELD UP DUE TO SHORTAGE OF CARTRIDGE BELTS. ALSO, AS OF 22 SEP, 8710 BELTS WERE STILL DUE FOR THE 3D MARDIV.

UNCLASSIFIED

CG FMFPAC 281811Z (U)

4. MISCELLANEOUS

a. OSD HAS ADVISED ALL CINCS AND COMUSMACV THAT A JOINT DOD/CIA COMMITTEE FOR COUNTER-INSURGENCY R&D PROJECTS HAS BEEN ESTABLISHED TO REVIEW CURRENT DOD AND CIA PROGRAMS, AND WORKING GROUPS WILL VISIT THEIR COMMANDS DURING 1-12 OCT.

OSD WASH DC 272241Z (S)
OSD WASH DC 282125Z (S)

b. JCS HAS INFORMED CINCNORAD THAT THE ANNUAL VISIT BY THE JOINT STAFF TO NORAD HEADQUARTERS IS SCHEDULED FOR NOV WITH THE WEEK OF 12 THRU 16 NOV PREFERRED.

JCS 282044Z (U)

5. MOVEMENTS

a. 1ST RECON BN, AND ELEMENTS OF THE 1ST SVC BN AND 1ST FSR ARRIVED CWTC BRIDGEPORT, CALIF., YESTERDAY, 28 SEP, FOR COLD WEATHER TRAINING.

CG 1ST MARDIV 282040Z (U)

b. CMC DEPARTED SAIGON 280042Z AND ARRIVED BANGKOK 280337Z.

[redacted]

UNCLASSIFIED

[redacted]

6220TH AB SQ APO 143 280120Z (U)
TRI SERV ATCO BANGKOK THAILAND
280505Z (U)

UNCLASSIFIED

c. MAJ/GEN F. C. THARIN WILL ASSUME COMMAND OF 3D MAW ON 1 OCT, RELIEVING MAJ/GEN J. P. CONDON.

CG 3RD MAW 281600Z (U)

d. MAJ/GEN BOWSER ARRIVED ANDREWS, AFB, YESTERDAY, 28 SEP, FROM MEMPHIS, TENNESSEE.

FLTSEC ANDREWS AFB 282105Z (U)

e. MAJ/GEN A. F. BINNEY, WAS ADMITTED TO THE NAVAL HOSPITAL, PORTSMOUTH, VA., YESTERDAY, 28 SEP, FOR AN ESTIMATED 3 DAYS. THE DIAGNOSIS IS ACUTE SINUSITIS.

NAVHOSP PORTSMOUTH VA 281808Z (U)

6. DEFCONS

a. NO CHANGE.

JWR

7. SELECTED ITEMS FROM DIA BULLETIN 28 SEPTEMBER 1962

a. CUBA

IN CUBA, THREE MORE SA-2 (SAM) SITES HAVE BEEN IDENTIFIED, INCREASING THE TOTAL OF CONFIRMED AIR DEFENSE MISSILE

[redacted]

UNCLASSIFIED

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SITES TO 14. THESE NEWEST IDENTIFICATIONS ARE ALL IN ORIENTE PROVINCE, THE EASTERNMOST CUBAN PROVINCE. IT IS ANTICIPATED THAT AS THE SOVIET ARMING OF CUBA CONTINUES, THIS NUMBER WILL INCREASE.

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b. IT IS REPORTED THAT THE SOVIET UNION HAS TRANSFERRED AN ESTIMATED TOTAL OF 16 KOMAR-CLASS GUIDED-MISSILE PATROL BOATS TO CUBA.

UNCLASSIFIED

[redacted]